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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81 6245

CHARLES LAVERNE SINGLETON.....PETITIONER

V.

STATE OF ARKANSAS.....RESPONDENT

ON WRIT OF CERTIORARI
TO THE
SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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NO._____

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CHARLES LAVERNE SINGLETON PETITIONER

VS.

STATE OF ARKANSAS RESPONDENT

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TO THE SUPREME COURT OF ARKANSAS

Petitioner, Charles Laverne Singleton, a prisoner under sentence of death, petitions for a writ of certiorari to review the affirmance by the Supreme Court of Arkansas of his conviction and sentence for capital murder.

QUESTION PRESENTED

Whether a capital defendant's Sixth and Fourteenth Amendment rights are violated by a trial court's refusal to exclude for cause a venireman who indicates that he advocates the death penalty for all persons convicted of capital murder.

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OPINION BELOW

The opinion of the Supreme Court of Arkansas, reproduced in the Appendix, is reported as Singleton v. State, 274 Ark. 126, 623 S.W. 2d 180 (1981).

JURISDICTION

The opinion of the Supreme Court of Arkansas affirming the conviction and death sentence of Petitioner was rendered on October 26, 1981. A timely petition for rehearing was denied and the mandate issued on November 23, 1981. On January 20, 1982 the Honorable Harry A. Blackmun granted an extension of time to petition for writ of certiorari until and inclusive of February 20, 1982. This court's jurisdiction is invoked under 28 U.S.C. 1257(3), with Singleton asserting a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a...trial, by an impartial jury...

Fourteenth Amendment, United States Constitution:

> (N)or shall any State deprive any person of life, liberty or property without due process of law.

Arkansas Statutes Annotated:

> 41-1301. The following procedure shall govern trials of persons charged with capital murder:
>
> (1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.

*****

(3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subsection (4) hereof, and to determine sentence in the manner provided by section 1302.

41-1302. (1) The jury shall impose a sentence of death if it unanimously returns written findings that:

(a) aggravating circumstances exist beyond a reasonable doubt; and

(b) aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and

(c) aggravating circumstances justify a sentence of death beyond a reasonable doubt.

(2) The jury shall impose a sentence of life imprisonment without parole if it finds that:

(a) aggravating circumstances do not exist beyond a reasonable doubt; or

(b) aggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist; or

(c) aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

(3) If the jury does not make all the findings required by subsection (1), the court shall impose a sentence of life imprisonment without parole.

41-1501. A person commits capital murder if:

(a) acting alone or with one or more other persons he commits or attempts to commit ...robbery...and in the course of and in furtherance of the felony he or an accomplice causes the death of any person under circumstances manifesting an extreme indifference to the value of human life.

43-1913. The challenge to the individual juror is: First. For cause. Second. Peremptory.

43-1918. Particular causes of challenge are actual and implied bias.

43-1919. Actual bias is the existence of such a state of mind on the part of the juror, in regard to the case or to either party, as satisfies the court, in the exercise of a sound discretion, that he cannot try the case impartially, and without substantial prejudice to the substantial rights of the party challenging.

43-1922. The defendant shall be entitled to tweleve (12) peremptory challenges in prosecutions for offenses punishable by death or life imprisonment....

STATEMENT OF THE CASE

On October 30, 1979, Petitioner, a black man then 19-years-old, was convicted of capital murder allegedly occurring during the course of a robbery, in violation of Ark. Stat. Ann. 41-1501(a), and also of aggravated robbery, in violation of Ark. Stat. Ann. 41-2102 (Repl. 1977). He was sentenced to death by electrocution on the capital murder conviction and to life imprisonment on the aggravated robbery.

The Arkansas Supreme Court, by opinion rendered October 26, 1981, affirmed Petitioner's conviction and sentence for capital murder, but vacated the robbery conviction on double jeopardy grounds. Singleton v. State, 274 Ark. 126, 623 S.W. 2d 180 (1981).

On November 23, 1981, the Supreme Court of Arkansas denied rehearing, issued the mandate, and relieved his trial counsel, who also served as counsel on direct appeal. On December 9, 1981 present counsel made entry of appearance; that same day Frank White, the governor of Arkansas, set an execution date of January 8, 1982. Petitioner sought recall of the mandate and stay of execution pending petition for writ of certiorari; this request was granted. On January 20, 1982, the Honorable Harry A. Blackmun granted an extension of time until February 20, 1982 for petitioner to complete his petition for writ of certiorari.

In his appeal to the Arkansas Supreme Court, Singleton raised the following points of error:

a) The trial court's failure to exclude for cause two veniremen who had expressed preconceived ideas

about the circumstances of the death of the alleged victim;

b) The trial court's failure to exclude for cause a venireman who indicated that he was for the death penalty for all persons convicted of murder;

c) The trial court's failure to exclude for cause a venireman who indicated he would vote with the majority in the jury;

d) The admission of certain extrajudicial statements of the alleged victim; and

e) Improper reference to certain excluded photographs.

In affirming Petitioner's conviction and death sentence, the court said there had not been sufficient demonstration that he had been forced to take an unsatisfactory juror as a result of challenging peremptorily the veniremen complained of; that the extrajudicial statements were properly admitted; and that no reversible error occurred in the reference to photographs. From this affirmance, Petitioner brings this petition for writ of certiorari.

REASON FOR GRANTING THE WRIT

PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO EXCLUDE FOR CAUSE A VENIREMAN WHO ADVOCATED THE DEATH PENALTY FOR ALL PERSONS CONVICTED OF CAPITAL MURDER.

This case deals with the question of whether a capital defendant's fair trial and due process rights are violated when the trial court refuses to exclude for cause a prospective juror who has indicated that he advocates imposition of the death penalty for all persons convicted of capital murder.

The Arkansas statutory procedures in capital prosecutions, as followed in the instant case, require the jury to sit in determination of guilt or innocence. If a conviction of capital murder is returned, as here, the same jury sits again on the issue of punishment. Ark. Stat. Ann. 41-1301. The only possible punishments upon conviction are death by electrocution and life imprisonment without parole. Ark. Stat. Ann. 41-1302.

A defendant in a capital case in Arkansas has twelve peremptory challenges. Ark. Stat. Ann. 43-1922. "Actual bias," however, is the subject of a challenge for cause, and is defined by Ark. Stat. Ann. 43-1919 as "a state of mind...that he cannot try the case impartially and without substantial prejudice to the rights of the party challenging."

At his trial, Petitioner unsuccessfully challenged for cause, and thereby was forced to use a peremptory

challenge on, venireman Raymond Taylor. The voir dire of Mr. Taylor is reproduced in the Appendix. The following excerpts are illustrative:

> MR. WELLENBERGER (Defense Counsel): Was there any discussion about, maybe, what the penalty ought to be for somebody that would do something like that?
> PROSPECTIVE JUROR: Yes, there was.
> MR. WELLENBERGER: What was that discussion?
> PROSPECTIVE JUROR:Well, they, the same as he inflicted.
> MR. WELLENBERGER: In other words---
> PROSPECTIVE JUROR: The death penalty.
> MR. WELLENBERGER: In other words, the discussion was that anybody that would do something like that ought to be put to death?
> PROSPECTIVE JUROR: That's right.
> MR. WELLENBERGER: Do you share that belief?
> PROSPECTIVE JUROR: Yes, I do.
> MR. WELLENBERGER: And do you believe that anybody that would commit a crime like that ought to be put to death, period?
> PROSPECTIVE JUROR: That anybody that commits murder ought to be put to death. (R. 339-340).

Then at another point:

> MR. WELLENBERGER: ...My question is, could you, after you've already found him guilty of this crime, beyond any reasonable doubt, could you, then, consider mitigating circumstances and weight them and come back with a sentence of life imprisonment without parole?
> PROSPECTIVE JUROR: (No answer)
> THE COURT: Mr. Wellenberger, don't you think you should rephrase it and ask him would he consider both mitigating and aggravating circumstances?
> MR. WELLENBERGER: I'm just asking him if he foudd the mitigating circumstances to preponderate over the aggravating circumstances, if he could---
> THE COURT: I understand.
> PROSPECTIVE JUROR: I think I could.
> THE COURT: I think that's proper. (R. 341)

But, then at another juncture, this transpired:

> MR. WELLENBERGER: What is your frame of mind about capital murder?
> PROSPECTIVE JUROR: Well, they sould get exactly what they dished out.
> MR WELLENBERGER: Period.
> PROSPECTIVE JUROR: Period.
> MR. WELLENBERGER: And if you were convinced that they did it, then that's what you're going to give them.
> PROSPECTIVE JUROR: If I was convinced that they had the wrong man, I wouldn't go with it.
> MR. WELLENBERGER: But if you were convinced he was the man that did it--
> PROSPECTIVE JUROR: I'd be for executing him.
> MR WELLENBERGER: Period?
> PROSPECTIVE JUROR: Period. (R. 343-344)

Petitioner subsequently exhausted his peremptory challenges. After exhaustion a juror was seated who had previously had a family member "victimized" by a similar crime. (R. 766). The Arkansas Supreme Court disposed of this issue by stating that Petitioner had failed to make an adequate record on which seated jurors he would have peremptorily challenged had the challenges remained available.

It is clear that the punishment phase of a capital trial is equally as important as the guilt phase. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393 (1977). In a penalty phase framework like Missouri's, of which Arkansas' is a close analogue, other rights, such as protection against double jeopardy, are attendant. Bullington v. Missouri, ____U.S. ____, 68 L.Ed. 2d 270 (1981).

The definition of actual bias under Ark. Stat. Ann. 43-1919, when read in conjunction with Gardner, Bullington, and other cases, make it abundantly clear that a defendant is entitled to fairness in consideration of punishment as well as guilt. The remarks of venireman Taylor are quit clear and unmistakable on the issue of punishment.

In Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed. 2d 776 (1968) this Court held that a venireman who could consider both punishments was not excusable for cause, but if the prospective juror was committed in advance to one punishment, in that case life, that he could be excluded. Witherspoon and its progeny also hold that an improper excusal for cause is suf-

ficient ground to set aside a death penalty.

The Arkansas Supreme Court has expressed itself in dictum on the issue of the automatic death venireman. In Hobbs v. State, 617 S.W. 2d 347 (1981) the Court said:

> It is only those jurors irrevocably committed to voting for or against the death penalty who should not sit...Meeting the test of Witherspoon...should be kept simple. The test is whether one can fairly consider one of two alternative punishments. At 349.

Petitioner submits that to fail to exclude for cause a prospective juror with the views on capital punishment espoused by Mr. Taylor was violative of his Sixth Amendment fair trial and Fourteenth Amendment due process rights.

This Court has never squarely decided the issue of the status of a venireman with these views. The Court should grant certiorari to decide the issue, reverse the conviction and remand the case for a new trial.

CONCLUSION

The petition for writ of certiorari to the Supreme Court of Arkansas should be granted and the decision of that court should be reversed. This Court should set this matter for oral argument on the issue outlined above.

Respectfully submitted,

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SUPREME COURT OF ARKANSAS

No. CR80-69

Opinion Delivered OCT 26 1981

CHARLES LAVERNE SINGLETON,

APPELLANT,

V.

STATE OF ARKANSAS,

APPELLEE.

AN APPEAL FROM ASHLEY CIRCUIT COURT; PAUL K. ROBERTS, JUDGE.

AFFIRMED IN PART; REVERSED IN PART.

RICHARD B. ADKISSON, Chief Justice

On October 30, 1979, after a trial by jury, appellant, Charles L. Singleton, was sentenced to death by electrocution for capital felony murder, and life imprisonment for aggravated robbery.

We affirm the conviction and sentence for capital felony murder, but set aside the lesser included offense of aggravated robbery. Ark. Stat. Ann. § 41-105 (1)(a)(2)(a) (Repl. 1977) prohibits the entry of a judgment of conviction on capital felony murder and the underlying specified felony. Swaite v. State, 272 Ark. 128, 612 S.W. 2d 307 (1981). Generally, this Court will not consider errors raised for the first time on appeal; however, we note that the judgment in this case was entered before our decision in Swaite. In death penalty cases we will consider errors argued for the first time on direct appeal where prejudice is conclusively shown by the record and this Court would unquestionably require the trial court to grant relief under Rule 37.

The victim, Mary Lou York, was murdered in York's Grocery Store at Hamburg on June 1, 1979. She died from loss of blood as a result of two stab wounds in her neck.

The evidence of guilt in this case is overwhelming. Patti Franklin saw her relative Singleton enter York's Grocery at approximately 7:30 p.m. on the day of the crime. Shortly after he entered Patti heard Mrs. York scream, "Patti go get help, Charles Singleton is killing me." Patti then ran for help. Another witness, Lenora Howard, observed Singleton exit the store and shortly thereafter witnessed

Mrs. York, who was "crying and had blood on her," come to the front door. Police Officer Strother was the first to arrive at the scene and found Mrs. York lying in a pool of blood in the rear of the store. The officer testified Mrs. York told him that Charles Singleton "came in the store, said this is a robbery, grabbed her around the neck, and went to stabbing her." She then told Officer Strother that "there's no way I can be all right, you know I'm not going to make it. I've lost too much blood." Mrs. York was taken to the hospital in an ambulance and was attended by her personal physician, Dr. J. D. Rankin. While enroute to the hospital, she told Dr. Rankin several times that she was dying and that Singleton did it. Mrs. York died before reaching the emergency room of the hospital. Officer Strother also testified that during examination of the premises, he found a money bag on the floor near the cash register which was empty, except for about $2.00 in change. He also stated that the cash register had only a small amount of change in it.

Appellant contends the trial court committed reversible error by failing to excuse for cause veniremen Waldrup, Goyne, Taylor, and Estelle. Appellant exercised a peremptory challenge on each of these prospective jurors but made no showing of record that he would have struck any other juror who actually sat on the trial of the case had he had a peremptory challenge remaining. Under such circumstances we have consistently held that appellant has shown no prejudice since he is unable to show that an objectionable juror was forced upon him without his having the privilege of exercising a peremptory challenge. Conley v. State, 270 Ark. 886, 607 S.W. 2d 328 (1980); Arkansas State Highway Comm. v. Dalrymple, 252 Ark. 771, 480 S.W. 2d 955 (1972); Green v. State, 223 Ark. 761, 270 S.W. 2d 895 (1954). In Glover v. State, 248 Ark. 1260, 455 S.W. 2d 670 (1970) the defense in exhausting

his peremptory challenges used some of his challenges to remove unacceptable veniremen, then stated for the record that had he not been required to use his challenges on jurors that should have been excused for cause, a particular juror who was seated and actually served would have been challenged. In Glover we found that the error had been preserved and reversed the judgment.

Appellant argues for the first time on appeal that he would have exercised peremptory challenge on two specific jurors had the court granted his challenges for cause. The record does not reflect that the two jurors specified were biased or otherwise unqualified to serve. This Court has consistently held that it wil not consider alleged errors raised for the first time on appeal. Wicks v. State, 270 Ark. 781, 606 S.W. 2d 366 (1980).

Appellant next argues that the trial court erred in admitting as hearsay the statements made by the victim. The statements of the victim were admissible under two separate exceptions to the rule against hearsay. Rule 803(2), Uniform Rules of Evidence, Ark. Stat. Ann. §28-1001 (Repl. 1979) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ....
>
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

And, Rule 804(b)(2), Uniform Rules of Evidence provides:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ....
>
> (2) Statement under belief of impending death. A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

All of the victim's statements were related to Singleton cutting her throat and, as a result, her dying. These statements clearly fall under the excited utterance exception to the rule against hearsay since they were made under the stress of the event.

The victim cried out to Patti Franklin that Singleton was killing her. She told Officer Strother that she was not going to make it because she had lost too much blood, and she repeatedly told her physician, Dr. Rankin, that she was dying. It is clear that all of her statements were made under the dying declaration exception to the rule against hearsay. Each of these statements were made concerning the cause or circumstances of what she believed to be her impending death.

It is argued that there was no showing by the state that Mrs. York had firsthand knowledge of the identity of the appellant. This is unsupported by any reasonable view of the evidence.

Finally, appellant asserts the trial court erred in its rulings regarding photographs of the crime scene and the victim. Appellant seems to base his argument on two primary allegations: (1) that it was error to allow Chief Kennedy to refer to photographs of the crime scene previously held inadmissible as inflammatory and, (2) that the prosecutor was guilty of misconduct in attempting to introduce a photograph of the victim's body after the trial court had ruled it inadmissible, defense counsel having stipulated to the cause of death.

Chief Kennedy testified that he took the photographs when he arrived at the crime scene. He referred to the pictures to refresh his memory of the scene while testifying at the trial. The record does not disclose a specific objection regarding Kennedy refreshing his memory. Defense

counsel did state that the prosecutor's handling of the pictures was calculated to prejudice his client and asked for a mistrial. Thus, the only objection seems to be a vague allegation of prosecutorial misconduct. Rule 612, Uniform Rules of Evidence; Ark. Stat. Ann. §28-1001 (Repl. 1979) provides that a witness may refer to an object or writing to refrech his memory while testifying.

The prosecutor attempted to introduce a photograph of the victim's body to show the location of the stab wounds. Defense counsel objected on the grounds that the court had ruled that the photograph of the deceased was inadmissible since defense counsel had stipulated to the cause of death. There were at least three in-chamber hearings regarding the introduction of a photograph of the deceased. The prosecutor maintained he never stipulated that the photograph should not be introduced, a position which seems to be suported by the record. The defense counsel argued that there was a stipulation that a photograph of the deceased would not be admissible, and, regardless of the stipulation, the trial court's ruling should have precluded the prosecutor from attempting to introduce the photograph. The trial judge did rule that the photograph would not be admissible if the cause of death was stipulated. But the prosecutor maintained that he did not so stipulate and that he had a right and duty to prove every essential element of the charge, and he was only attempting to show the nature and extent of the wounds and not the identity of the victim or that she was, in fact, dead.

In any event, we can say beyond a reasonable doubt that under the facts of this case no prejudíceresulted to the defendant from the prosecutor's attempt to introduce a

picture of the deceased. The court sustained defense counsel's objection, and none of the pictures were ever viewed by the jury. Some confusion did exist due to the prosecutor's position that he was entitled to prove his case as fully as possible, but this confusion does not constitute reversible error.

Where life imprisonment or death was imposed in the court below, the Supreme Court reviews the entire record for errors prejudicial to the right of the appellant. Rule 36.24, Ark. Rules Crim. Proc., Ark. Stat. Ann., Vol. 4A (Repl. 1977). To facilitate this review, Rule 11(f), Rules of the Supreme Court, Ark. Stat. Ann., Vol. 3A (Repl. 1979) was promulgated:

> [T]he appellant must abstract all objections that were decided adversely to him in the trial court together with such parts of the record as are needed for an understanding of the objection. The attorney general will make certain that all objections have been so abstracted and will brief all points argued by the appellant and any other points that appear to him to involve prejudicial error.

This means that both the counsel for appellant and counsel for the State must examine the record page by page to be certain that all objections are brought to the Court's attention. For many years the members of this Court made that examination in capital cases before the rule was amended to read as it does now. Earl v. State, 272 Ark. 5, 612 S.W. 2d 98 (1981); Curry v. State, 270 Ark. 570, 605 S.W. 2d 748 (1980).

We have examined all objections and find no error.

Affirmed in part; reversed in part.

Hickman and Dudley, J.J., dissent in part.

MR. WELLENBERGER: (Continuing) But the reason why we must ask these questions is because of the nature of the proceedings and our criminal justice system which requires that we impanel a fair, impartial and non prejudicial jury to try this case. So if I should ask you a question a little bit later on that might embarrass you, or that you might feel that I'm trying to pry into your personal matters and affairs, I hope you will forgive me and remember the purpose for which I ask it.

I have no desire to delve into your personal affairs,only to the extent required to assure that we can get an impartial jury. And I hope, and I'm asking anyone here, if they would take offense to my asking them questions for this purpose.

Thank you.

THE COURT: Mr. Crow, will you take the members of the jury down to the other courtroom where they will wait and they will be called back in here one by one. Go with Mr. Crow.

Draw your first one, Mr. Clerk.

CLERK: Raymond R. Taylor.

MR. GIBSON: If it please the Court, Mr. Taylor?

PROSPECTIVE JUROR: Yes, sir.

MR. GIBSON: You reside in Crossett?

PROSPECTIVE JUROR: Yes.

MR. GIBSON: In which direction?

PROSPECTIVE JUROR: West.

MR. GIBSON: And how long have you lived in Ashley County?

PROSPECTIVE JUROR: Fifty-nine years.

MR. GIBSON: Do you have any children?

PROSPECTIVE JUROR: Three.

MR. GIBSON: Are they living here in Ashley County, also?

PROSPECTIVE JUROR: Two of them. One at Little Rock.

MR. GIBSON: Are they married? Or do they have families?

PROSPECTIVE JUROR: Two married and one divorced.

MR. GIBSON: As you have, I'm sure, understood by now that this is a very serious charge in this case. The States alleges that the defendant on June 1st of this year committed aggravated robbery and in the course and furtherance thereof, he caused the death of Mary Lou York, who resided here in Hamburg. And that this death was caused under circumstances manifesting extreme indifference to the value of human life.

Now, the maximum punishment for that, under our law, is death by electrocution. Do you have any particular notions about what types of cases would be proper to sentence a person who is guilty thereof to such a penalty?

PROSPECTIVE JUROR: Well, murder would be the, about the only thing or premeditated, or murder is the only thing I'd have.

MR. GIBSON: Okay, sir. Have you ever had a close friend or family member who was the victim of such a crime?

PROSPECTIVE JUROR: No, I haven't.

MR. GIBSON: Have you ever had a close friend or family member who was a victim of a robbery where there was no death involved?

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PROSPECTIVE JUROR: No.

MR. GIBSON: Have you ever been a witness before in a case?

PROSPECTIVE JUROR: No.

MR. GIBSON: And I assume that since you are still with us, that you don't have anything pressing or of such nature that would cause you to be unable to sit on this jury and give it your undivided attention during the course of this trial.

PROSPECTIVE JUROR: Nothing.

MR. GIBSON: Now, and I remember the Court asking you if you had discussed this case with anyone who knew enough about it to form or express an opinion.

Now, I'm going to ask that to you again, because many times you sit out there and the Court fires the questions to us and we are trying, and about the time we try to understand what he's asking us, he moves to another one. So, I'll ask you again.

PROSPECTIVE JUROR: Well, nothing. I read it in the papers and what not, and just general discussion with workers.

MR. GIBSON: Okay, sir. So you do not have an opinion of it at this time--

PROSPECTIVE JUROR: No.

MR. GIBSON: --of the defendant's guilt or innocence?

PROSPECTIVE JUROR: No. I don't know anything in particular about it.

MR. GIBSON: Now, you will be instructed that, as to the burden that we, the State, are under in proving the case, that is

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MR. GIBSON: (Continuing) that we have the burden of proving the defendant guilty beyond all reasonable doubt.

PROSPECTIVE JUROR: Yes.

MR. GIBSON: Now, I'd like to ask you what type proof it might require to remove reasonable doubt from your mind because at this time, you understand that the defendant is presumed to be not guilty and we must prove him guilty to you. He's not required to prove his innocence. And in the course of this trial, we intend to submit proof consisting of what is known in law as a dying declaration. That is a statement made by the victim, who is knowledgeable of impending death and makes a statement under those circumstances alleging who did the, who committed the offense.

Now, would you be able to believe such testimony?

PROSPECTIVE JUROR: I would.

MR. GIBSON: And you are one hundred percent sure that anything you've heard about this offense, you can set aside and listen only to what comes from the witness stand here today?

PROSPECTIVE JUROR: I believe I can.

MR. GIBSON: I will pass the juror.

MR. WELLENBERGER: Mr. Taylor, I've introduced myself to you awhile ago and the Judge did, too, but I'll do it again. I'm Bob Wellenberger and I'm an attorney from Monticello. I'm glad to be down in this part of the country. It's awful pretty down here.

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MR. WELLENBERGER: (Continuing) I see that you are married and I heard you say that you had three children. Apparently they are grown and not living with you?

PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: And you're a painter by trade?

PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: I've got a father-in-law that's a painter. And your wife is a housewife and helped raise the children?

PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: Have you ever served on the jury before?

PROSPECTIVE JUROR: No, I haven't.

MR. WELLENBERGER: Do you understand or have any understandings about how all this is going to work?

PROSPECTIVE JUROR: Not in the least.

MR. WELLENBERGER: Of course, the initial thing that happened was the crime and then when the crime was committed the police began their investigation. And then they settled on a person whom they thought they had sufficient evidence to prove he was guilty in this case.

They have charged the defendant, Mr. Singleton, with committing the crime on their belief that they have probable cause to believe he's guilty of the crime.

Now, they do this through what is known as an Information. This is a piece of paper that the Judge read to you previously where it stated that he was charged with capital felony murder and aggravated robbery.

MR. WELLENBERGER: (Continuing) Now, these pieces of paper, do you understand they are not any evidence at all?

PROSPECTIVE JUROR: Yes, sir.

MR. WELLENBERGER: They are just pieces of paper that were filed in this Court to bring the defendant to Court for trial. Have you ever been sued in a civil case?

PROSPECTIVE JUROR: Nothing but a car wreck.

MR. WELLENBERGER: Well, that Information doesn't have any more meaning than that complaint that you were served with. In other words, just because there was a complaint drawn doesn't mean that you did what they claimed. It might, but it doesn't mean-- That's not proof.

And you won't consider the Information in this case as proof of this man's guilt?

PROSPECTIVE JUROR: Huh-uh.

MR. WELLENBERGER: Now, do you have any relatives or close friends who work on the police department?

PROSPECTIVE JUROR: (Nodding negatively)

MR. WELLENBERGER: Have you ever been in the military?

PROSPECTIVE JUROR: Yes.

MR. WELLENBERGER: Were you ever a police officer in the military?

PROSPECTIVE JUROR: Yes.

MR. WELLENBERGER: You were?

PROSPECTIVE JUROR: (Nodding affirmatively)

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MR. WELLENBERGER: Then you have some understanding about how all of this works?

PROSPECTIVE JUROR: Uh-huh.

MR. WELLENBERGER: And as a result of your -- I want you to be candid with me -- as a result of your having this police type background when you were in the military, have you formed a belief that the police usually arrest people that are guilty?

PROSPECTIVE JUROR: Well, not altogether.

MR. WELLENBERGER: Not altogether?

PROSPECTIVE JUROR: I have reservations about it.

MR. WELLENBERGER: You know there are mistakes made from time to time?

PROSPECTIVE JUROR: Uh-huh.

MR. WELLENBERGER: Do you think that, from your experience, that a person who is arrested for the crime is probably guilty?

PROSPECTIVE JUROR: Yeah.

MR. WELLENBERGER: Having that opinion, do you think that you would require the defendant to produce evidence of his innocence?

PROSPECTIVE JUROR: Uh-huh.

MR. WELLENBERGER: Would not?

PROSPECTIVE JUROR: They've got to prove him guilty.

MR. WELLENBERGER: In other words, you're going to listen to the evidence as it's introduced in this case and just judge this case on the evidence as presented from the witness stand?

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PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: And you understand, now, that the defendant is presumed to be innocent?

PROSPECTIVE JUROR: (Nodding affirmatively)

MR. WELLENBERGER: And he will continue to have the benefit ofthat presumption of innocence until he's proven guilty beyond a reasonable doubt?

PROSPECTIVE JUROR: (Nodding affirmatively)

MR. WELLENBERGER: And do you promise me that you will give him the benefit of that presumption of innocence?

PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: And you do now presume him to be not guilty?

PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: Now, I noticed in your responses to some questions that Mr. Gibson asked, you indicated that you have read some newspaper accounts about this occurrence?

PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: What paper do you take?

PROSPECTIVE JUROR: Arkansas Gazette and I believe it was in this little county paper, too.

MR. WELLENBERGER: Which county? Crossett or Hamburg paper?

PROSPECTIVE JUROR: Crossett.

MR. WELLENBERGER: That would be the-- Do you know what the name of that is?

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PROSPECTIVE JUROR: Well, I have the News Observer, too, from Hamburg.

MR. WELLENBERGER: The News Observer. In other words, you take the Hamburg paper and the Crossett paper and you've read all three?

PROSPECTIVE JUROR: And the Gazette.

MR. WELLENBERGER: Do you read these papers regularly?

PROSPECTIVE JUROR: Yes, I do.

MR. WELLENBERGER: And you did read about this particular case?

PROSPECTIVE JUROR: Yes.

MR. WELLENBERGER: In probably both the Crossett paper and the Hamburg paper?

PROSPECTIVE JUROR: Uh-huh.

MR. WELLENBERGER: Do you recall anything from those articles?

PROSPECTIVE JUROR: Well, not particularly. It's pretty vague, now. I remember reading it and whatnot, but that's about the extent of it.

MR. WELLENBERGER: Do you remember anything about the man that they arrested?

PROSPECTIVE JUROR: No, I don't.

MR. WELLENBERGER: Do you-- Does your memory ever come back to you to recall things? When we get into this case and the evidence starts developing--

PROSPECTIVE JUROR: Well, yes, it would.

MR. WELLENBERGER: --then you probably would remember--

PROSPECTIVE JUROR: Would remember something.

MR. WELLENBERGER: --would remember--

PROSPECTIVE JUROR: Uh-huh.

MR. WELLENBERGER: I think you also stated that you had heard talk about this in public?

PROSPECTIVE JUROR: Well, yeah. In the mill. I work for GP in the mill. It's been discussed out there. Different--

MR. WELLENBERGER: What were the discussions about out there?

PROSPECTIVE JUROR: Well, just general talk as to how come and why anybody would kill somebody over a small amount in a little store or something like that.

MR. WELLENBERGER: Was there any discussion about, maybe, what the penalty ought to be for somebody that would do something like that?

PROSPECTIVE JUROR: Yes, there was.

MR. WELLENBERGER: What was that discussion?

PROSPECTIVE JUROR: Well, they, the same as he inflicted.

MR. WELLENBERGER: In other words--

PROSPECTIVE JUROR: The death penalty.

MR. WELLENBERGER: In other words, the discussion was that anybody that would do something like that ought to be put to death?

PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: Do you share that belief?

PROSPECTIVE JUROR: Yes, I do.

MR. WELLENBERGER: And do you believe that anybody that would commit a crime like that ought to be put to death, period?

PROSPECTIVE JUROR: That anybody that commits murder ought to be put to death.

MR. WELLENBERGER: Now, under our laws of the State of Arkansas, when a person is first put on trial for capital felony murder, the jury makes a determination of whether he's guilty or not guilty of committing the crime.

Now, let's assume for a minute that you heard that evidence and then we completed that phase of the trial. And the jury, in fact, did find the defendant guilty of capital felony murder. Remember, we are just assuming that right now.

Then, the next procedure would be on punishment. There would be additional evidence introduced concerning punishment. And our law says for certain circumstances which are considered to be aggravating circumstances, and certain circumstances which were said to be mitigating circumstances, and then you are required to look at the aggravating circumstances and the mitigating circumstances and weigh them.

And if the aggravating circumstances preponderate over the mitigating circumstances -- I hope I'm not misstating the law to you. If I am, the Judge will correct me later. -- then the

21 MR. WELLENBERGER: (Continuing) jury will return a penalty of
death by electrocution. I understand from what you said that you
could do that.
PROSPECTIVE JUROR: That's right.
MR. WELLENBERGER: I have another questions. The law
requires you to take into consideration mitigating circumstances,
and spells out what those circumstances are.
And if proof is introduced that one of these mitigating
circumstances exists, then the jury would be required to find
that that mitigating circumstance does exist and weigh it agains
aggravating circumstances.
My question is, could you, after you've already found him
guilty of this crime, beyond any reasonable doubt, could you,
then, consider mitigating circumstances and weigh them and
come back with a sentence of life imprisonment without parole?
PROSPECTIVE JUROR: (No answer)
THE COURT: Mr. Wellenberger, don't you think you should
rephrase it and ask him would he consider both mitigating and
aggravating circumstances?
MR. WELLENBERGER: I'm just asking him if he found the
mitigating circumstances to preponderate over aggravating
circumstances, if he could--
THE COURT: I understand.
PROSPECTIVE JUROR: I think I could.
THE COURT: I think that's proper.

MR. WELLENBERGER: Now, you have a lot of friends that you discussed this with or have been a part of discussions?

PROSPECTIVE JUROR: Yes.

MR. WELLENBERGER: And I take it from what you've answered me that the consensus of them believe that he deserves, or whoever committed this crime -- we are going to get out of presuming he's guilty because we are going to presume him innocent -- but whoever committed this crime ought to die.

PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: Do you feel that if you were on the jury and find a person guilty for this crime that you would be under a kind of pressure to work for the death penalty because of what your friends might think if you didn't sentence him to death?

PROSPECTIVE JUROR: No. Friends ain't got anything to do with it.

MR. WELLENBERGER: In other words, you are going to do what you think is right based on the evidence?

PROSPECTIVE JUROR: Uh-huh.

MR. WELLENBERGER: Now, you stated that you read both the Crossett and the Hamburg newspapers and that, though you don't really recall anything specific from them now--

PROSPECTIVE JUROR: No.

MR. WELLENBERGER:--that once we get into the case you probably would recall what you read?

PROSPECTIVE JUROR: Yes. Some of it. Most of it.

MR. WELLENBERGER: Now, do you recall anything about the evidence or the circumstances of the case?

PROSPECTIVE JUROR: No. Nothing more than, say, just general run of it, that whoever it was run out of the store and something or other. I don't remember just exactly how it was.

MR. WELLENBERGER: Do you remember any statements about the defendant when he was arrested, anything about his--

PROSPECTIVE JUROR: No. I don't remember anything about that.

MR. WELLENBERGER: --who he was or what he was or anything?

PROSPECTIVE JUROR: Huh-uh.

MR. WELLENBERGER: I'm going to ask you another hypothetical question hoping it never comes about. But let's suppose that you were my client in this case and you were the defendant and we were selecting the jury to try you.

Would you be satisfied with a jury composed of twelve persons who had the same frame of mind towards this as you do?

PROSPECTIVE JUROR: That puts the shoe on the other foot. I don't know. That's the frame of mind I have about capital murder.

MR. WELLENBERGER: What is your frame of mind about capital murder?

PROSPECTIVE JUROR: Well, they should get exactly what they dished out.

MR. WELLENBERGER: Period?

PROSPECTIVE JUROR: Period.

MR. WELLENBERGER: And if you were convinced that they did it, then that's what you are going to give them?

PROSPECTIVE JUROR: If I was convinced that they had the wrong man, I wouldn't go with it.

MR. WELLENBERGER: But if you were convinced he was the man that did it--

PROSPECTIVE JUROR: I'd be for executing him.

MR. WELLENBERGER: Period?

PROSPECTIVE JUROR: Period. If he did it.

MR. WELLENBERGER: I can understand and appreciate that. Did you know Mrs. Mary Lou York?

PROSPECTIVE JUROR: No.

MR. WELLENBERGER: She had a grocery store here in Hamburg and has a rather large family I understand, and lived here a long time. But you don't know whether you know--

PROSPECTIVE JUROR: Don't know any of them.

MR. WELLENBERGER: --any members of her family?

PROSPECTIVE JUROR: As far as I know I don't know her or any of the family either one.

MR. WELLENBERGER: Have you heard anything about them?

PROSPECTIVE JUROR: No.

MR. WELLENBERGER: Except that she was killed?

PROSPECTIVE JUROR: I just heard that, you know. Read that in the paper.

MR. WELLENBERGER: Now, let me ask you another question. What do you think about defense attorneys?

PROSPECTIVE JUROR: I don't know.

MR. WELLENBERGER: Well, I'm a defense attorney in this case. Mr. Gibson is prosecuting attorney.

PROSPECTIVE JUROR: I don't know him, either.

MR. WELLENBERGER: Well, since, you know, a lot of people watch Perry Mason and some of these other deals and they get a real wild impression about what defense attorneys do, and how they are always trying to get a guilty man off and this kind of stuff.

They see all these objections in the courtroom and they think that, they get some kind of ideas that the defense attorney is trying to pull some sort of shenanigans, get something by. Do you feel that way, maybe?

PROSPECTIVE JUROR: No. I wouldn't think so.

MR. WELLENBERGER: Actually what we are, we are in a courtroo and we are governed by procedures. And Mr. Gibson, I'm sure, during the course of this trial, is going to make an objection or two and I'm going to make an objection or two. Because every case that we've ever tried that's what happens.

We've never tried a case where there wasn't an objection of some sort. Now, the reason for an objection is to call to the Court's attention our position that maybe something that's about to be done or a question that's been asked is improper.

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MR. WELLENBERGER: (Continuing) And then, of course, once it's drawn to his attention, he will decide whether it's proper or not. And I just want you to understand it. Do you understand that that's what--

PROSPECTIVE JUROR: Yes.

MR. WELLENBERGER: We are not trying to pull shenanigans. We are just going to make sure that everything that's done in this courtroom and all the evidence that's introduced is proper. And you understand that?

PROSPECTIVE JUROR: Yes. I understand.

MR. WELLENBERGER: Since you haven't served on a jury before, during the course of the trial there will be an occasion where Mr. Gibson will address you in his opening statement and also at the end of the trial in closing argument and where I will address you in opening statement and in closing argument. We are not witnesses. We weren't there and we don't know anything except what other people have told us. And what we have in the way of evidence is going to be presented from the very seat where you are sitting now.

And what we tell you in our arguments to you is not to be considered by you as evidence. The Court will instruct you to that. Will you not consider what we say as evidence?

PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: Have you ever been the victim of a crime?

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PROSPECTIVE JUROR: No.

MR. WELLENBERGER: Has any member of your family or close friend been a victim of a crime?

PROSPECTIVE JUROR: No.

MR. WELLENBERGER: Maybe just somebody's stolen your paint brushes or something?

PROSPECTIVE JUROR: Not that I can remember. No.

MR. WELLENBERGER: Have you ever been a witness in a criminal case?

PROSPECTIVE JUROR: No.

MR. WELLENBERGER: I take it you are a man of convictions?

PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: If, after the trial is over and you get back to the jury room and you have a reasonable doubt about whether the defendant in this case is guilty or not guilty, then under the instructions the Court will give you, you will be required to vote for an acquittal or not guilty verdict. Do you understand that?

PROSPECTIVE JUROR: Yes.

MR. WELLENBERGER: Let's suppose that you go back to the jury room after the trial's over to deliberate, and during the course of the deliberation you discover that you're the only one who has reasonable doubt about his guilt. The other eleven say, "We've got no doubt at all. He's guilty." Would you promise me that you'd stick by your own personal convictions and vote not guilty in the face of the eleven other jurors if

MR. WELLENBERGER: (Continuing) you were convinced or if you had reasonable doubt?

PROSPECTIVE JUROR: They'd have to show me: I believe it.

MR. WELLENBERGER: Now, you realize that it's not what they show you, but the evidence that's introduced in Court?

PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: And if you have a reasonable doubt of his guilt or innocence, then you would find, you would vote not guilty and stick with it?

PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: Even in the face of the other eleven telling you that you've got no sense?

PROSPECTIVE JUROR: (Nodding affirmatively)

MR. WELLENBERGER: Have you ever had any dealings or experiences with people of the black race that might make it difficult for you to sit in impartial judgment in this case?

PROSPECTIVE JUROR: (Nodding negatively)

MR. WELLENBERGER: And the fact that the defendant is a Negro will not enter into your mind?

PROSPECTIVE JUROR: Huh-uh.

MR. WELLENBERGER: And you promise me that you are not going to consider that? You are going to consider the evidence that's introduced on the stand?

PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: Would you agree with me that you are enforcing the law -- it's kind of a complex question. Let me

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MR. WELLENBERGER: (Continuing) rethink it just a second. Would you agree with me that you would be enforcing the law just as much by entering a finding of not guilty, if you had reasonable doubt, as you would be by finding the defendant guilty?

PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: In other words, you'd take the proposition that the law of the land said that he's not guilty until he's proven guilty beyond a reasonable doubt? Do you take that seriously?

PROSPECTIVE JUROR: That's right.

MR. WELLENBERGER: And you will not require the defendant to prove his innocence?

PROSPECTIVE JUROR: No.

MR. WELLENBERGER: You will require the State to prove him guilty beyond a reasonable doubt?

PROSPECTIVE JUROR: (Nodding affirmatively)

MR. WELLENBERGER: I pass him back to the State, Your Honor. Thank you, Mr. Taylor.

MR. GIBSON: The State would accept Mr. Taylor.

MR. WELLENBERGER: Your Honor, I would submit Mr. Taylor for cause. I believe that Mr. Taylor is predisposed to find the defendant -- if the defendant is found guilty -- he would be predisposed to the death penalty and would not, under his testimony, would not really be able to weigh the mitigating and aggravating circumstances because of his belief that anybody that

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MR. WELLENBERGER: (Continuing) commits this type of crime ought to be electrocuted.

MR. GIBSON: Your Honor, I want to ask him another question then if there's any doubt--

THE COURT: Go ahead.

MR. GIBSON: Mr. Taylor, if you are selected to serve in this case, after hearing all the evidence and then being instructed on the law applicable to that evidence, and for you to consider that in this case,when you retire to the jury room, would you be guided by the law and would you follow the law in your determination of this case?

PROSPECTIVE JUROR: That's right.

MR. GIBSON: I submit he's a good juror, Your Honor.

THE COURT: I don't think that this juror is subject to being excused for cause.

MR. WELLENBERGER: Your Honor, I would also submit him for cause on the basis that he has admitted that he has read certain newspaper articles which have previously been introduced to this Court as containing certain items which are prejudicial to the defendant, and has stated to the Court that as the trial progresses that he will probably remember what those articles contained.

Now, I think that even though he does not now recall it, the danger that he will recall it during the course of the trial is so great, from his own testimony that he will recall it and be prejudiced against my client. And I think the risk is too great. And I will submit him for cause on that fact.

MR. GIBSON: Your Honor, he has sworn to answer the questions put to him and I recall him answering the question I put to him. And he said that anything that he'd heard outside this courtroom, anything he might have formed by way of an opinio anything that he might have read outside of this courtroom, he can set that aside and he's one hundred percent sure. I remembe asking him that question.

THE COURT: I don't think any of us live in a complete vaccuum. We have to associate with people. We find out things. But this juror said that he can put those aside. I'm not going to excuse him for cause.

MR. WELLENBERGER: Note my exceptions and I will excuse Mr. Taylor. Thank you, Mr. Taylor.

THE COURT: You've been excused.

Call the next prospective juror, please.

CLERK: Lee Simpson.

THE COURT: Mr. Simpson, if he's taken as a juror, he will ask to be excused to go to a funeral this afternoon, but I see no particular objection to that because we probably won't get started before three or four o'clock this afternoon. I wanted to bring that to your attention.

MR. GIBSON: Mr. Simpson, I want to introduce myself again. I know I've already been introduced to you by the Court, but I'm John Frank Gibson, Prosecuting Attorney. I don't know that I've ever met you before, but I would like to ask you a few questions

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IN THE 81 6245

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLES LAVERNE SINGLETON — Petitioner

vs.

STATE OF ARKANSAS — Respondent

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

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Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES LAVERNE SINGLETON,
Petitioner

VS.

STATE OF ARKANSAS,
Respondent

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, Charles Laverne Singleton, by his undersigned counsel, asks leave to file the petition for writ of certiorari without payment of costs and to proceed in forma pauperis, and in support hereof states:

1. An affidavit indicating petitioner's indigency is attached hereto.

2. Petitioner was declared indigent at the trial court level, and continued in that fashion on appeal to the Arkansas Supreme Court.

3. Petitioner is confined on death row in the Cummins Unit of the Arkansas Department of Correction.

4. Present counsel is serving pro bono publico.

WHEREFORE, Petitioner prays that this application be granted.

Respectfully submitted,

JEFFREY M. ROSENZWEIG
420 Three Hundred Spring Bldg.
Little Rock, Ark. 72201
(501) 372-5247

Counsel for Petitioner

Dated: February 17, 1982

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Application for leave to proceed in forma pauperis has been furnished by first class mail, postage prepaid, to the office of the Attorney General, State of Arkansas, Attn: Victra Fewell, State Capitol Grounds, Little Rock, Ark. 72201 this 17 day of February, 1982.

JEFFREY M. ROSENZWEIG

420 Three Hundred Spring Bldg.
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(501) 372-5247

Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES LAVERNE SINGLETON, Petitioner, v. THE STATE OF ARKANSAS, Respondent,	Case No. _____ AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

STATE OF ARKANSAS)
)ss.
COUNTY OF LINCOLN)

I, Charles Laverne Singleton, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe that I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed?

Yes_____ No✓_____

a) If the answer is "yes" state the amount of your salary or wages per month, and give the name and address of your employer.

_____

b. If the answer is "no," state the date of last employment and the amount of salary and wages per month which you received.

1979 - $120 a week

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession, or form of self-employment?
Yes___ No✓___

b. Rent payments, interest or dividends?
Yes___ No✓___

c. Pensions, annuities or life insurance payments?
Yes___ No✓___

d. Gifts or inheritances?
Yes___ No✓___

e. Any other sources?
Yes✓___ No___

If the answer to any of the above is "yes" describe each source of money and state the amount received during the past twelve months:

Received from family - necessity ($5c)

3. Do you own cash, or do you have money in checking or savings accounts? (Including any funds in prison accounts.)

Yes___ No✓___

If the answer is "yes" state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

Yes_____ No ✓

If the answer is "yes." describe the property and state its approximate value.

_____

5. List the persons who are dependent on you for support, state your relationship to those persons and indicate how much you contribute to their support.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Charles Singleton

Charles Laverne Singleton

STATE OF ARKANSAS)
)ss.
COUNTY OF LINCOLN)

Charles Laverne Singleton, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

Charles Singleton

Charles Laverne Singleton

Subscribed and sworn to before me this 16 day of Jan, 1982.

Jackie D. Sanders
Notary Public

My commission expires: Oct 20, 1989

NO. 81-6245

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1981 TERM

CHARLES LAVERNE SINGLETON — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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NO. 81-6245

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1981 TERM

CHARLES LAVERNE SINGLETON — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT
IN OPPOSITION TO PETITION

Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a capital defendant's Sixth and Fourteenth Amendment rights are violated by a trial court's refusal to exclude for cause a venireman who indicates that he prefers the death penalty for all persons convicted of capital murder.

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OPINION BELOW

The opinion of the Arkansas Supreme Court is Singleton v. State, 274 Ark. 126, 623 S.W.2d 180 (1981).

JURISDICTION

The petitioner has adequately set forth the grounds for jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The petitioner has adequately set forth the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

The petitioner has adequately set forth the facts of the case.

REASON FOR DENYING THE WRIT

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE TRIAL COURT'S REFUSAL TO EXCLUDE FOR CAUSE A VENIREMAN WHO STATED THAT HE WOULD FOLLOW THE LAW IN THE DETERMINATION OF GUILT AND SENTENCE.

Petitioner alleges here, as he did on direct appeal to the Arkansas Supreme Court that his constitutional rights were violated when the trial court refused to excuse for cause venireman Raymond Taylor, who initially indicated a preference for the death penalty for those convicted of capital murder. Petitioner has generally quoted only those portions of the voir dire of Mr. Taylor which support his allegation.

After defense counsel explained to Mr. Taylor how the sentencing phase would be conducted if petitioner were found guilty and briefly outlined the instructions with regard to sentencing, he asked if Mr. Taylor could "consider mitigating circumstances and weigh then and come back with a sentence of life imprisonment without parole," Mr. Taylor replied, "I think I could." (T. 341) When asked if he would feel pressure to return the death penalty because some of his friends believed that convicted murderers deserve to die, Mr. Taylor replied, "No. Friends ain't got anything to do with it." Mr. Taylor then indicated that he would do what he thought was right based on the evidence. (T. 342) Mr. Taylor also agreed to be guided by and to follow the law in his determination of the case. (T. 349-350)

Respondent cannot deny that Taylor stated that he believed, as a general rule, that anyone who is convicted of capital murder should be executed. It is highly significant, however, that when defense counsel described the penalty phase of the trial, Taylor stated that he could consider and weigh mitigating circumstances and render a verdict of life without parole.

If the circumstances were reversed in this case, Taylor would not be excusable for cause pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968). While he preferred one of the

possible penalties over the other, he stated clearly that he could return life without parole if the evidence warranted it. To be excusable on Witherspoon grounds by the State, he would have had to state unequivocally that he would never impose the death penalty; conversely, to be excusable by the defense on analogous grounds, he would have had to state unequivocally that he would never return a sentence of life without parole. He certainly did not go that far. For the State to be allowed to excuse Taylor merely because of his beliefs about the death penalty would violate Witherspoon; it would be just as improper to allow the defense to have him excused because of his beliefs when he stated that those beliefs would not preclude his acting otherwise.

This Court seemed to recognize the class of jurors to which Taylor belongs when it noted in Witherspoon, 394 U.S. at 519: "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." The standard for excusal by the State under Witherspoon was set out at 391 U.S. 522 n. 21. If that language were paraphrased to state a standard for excusal by the defense on analogous grounds, it would read: The only veniremen who may be excluded for cause are those who make unmistakably clear (1) that they would automatically vote for the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Taulor did not take either of those positions.

It can be inferred from this Court's opinion in Boulden v. Holman, 394 U.S. 478 (1969), that a juror must be considered fair and impartial and cannot be excused on Witherspoon grounds, even if he has a "fixed opinion" against capital punishment, if he states that he is able "to follow conscientiously the instructions of the trial judge and to consider fairly the

imposition of the death penalty in a particular case." Id., 394 U.S. at 484. Similarly, Taylor could serve fairly and impartially, despite a "fixed opinion" in favor of capital punishment, since he would follow the instructions of the trial court and consider fairly the imposition of the other possible penalty, life imprisonment without parole. He stated that he could do this, and the trial court evidently found his testimony credible. That is all that is required.

One other distinction might need to be made regarding the seating of a juror with strong feelings or beliefs regarding the death penalty. Ark. Stat. Ann. §41-1302 (Repl. 1977) requires that the jury be unanimous in its findings that the death penalty should be imposed. If even one juror refuses and the jury hangs on this issue, the trial court must impose life without parole. §41-1302(3). This explains to some extent the purpose of the Witherspoon rule, because even one juror could prevent the State from imposing a valid penalty. The converse is not the case, however. The requirement of unanimity always gives the advantage to the defendant. Even assuming, for the sake of argument, that Taylor would have voted to impose the death penalty, that vote would carry absolutely no weight without the votes of all other 11 jurors.

According to Taylor's own testimony, his position can be fairly characterized as no more than a strong belief in the death penalty, tempered by a willingness to consider and impose both possible penalties. Thus, the trial court did not err in finding him competent to serve.

Respondent will not deny that the constitutional safeguards attending the penalty phase of a capital murder trial are equally significant to those in the guilt phase. This Court has held, however, that a prospective juror may be seated even if he has expressed some preconceived opinion about the defendant's guilt, so long as it is adequately demonstrated that he can set aside that opinion, follow the law and the instructions

of the trial court and decide the case based only on the evidence presented. Dobbert v. Florida, 432 U.S. 282 (1977); Murphy v. Florida, 421 U.S. 794 (1975). It seems equally logical that a venireman with a preconceived opinion about penalty is not automatically disqualified if he is willing to set aside that opinion and be guided by the law and the evidence in deciding penalty.

A defendant is not entitled to a perfect jury, even in a capital murder case, and, if he were, defense attorneys would probably differ from each other and from the court on what constituted such a mythical creature. Defendants would obviously prefer jurors strongly opposed to the death penalty, while the State obviously prefers those strongly in favor of it. Neither side is entitled to its preferred composition, and neither is entitled to eliminate those prospective jurors whose beliefs are unfavorable, so long as they all swear to follow the law and the instructions and give both sides a fair trial.

It should be noted that petitioner's only allegation of possible prejudice was that he had to exercise a peremptory to keep Mr. Taylor off the jury. While respondent submits that Mr. Taylor could properly have served, a slightly different question might have been presented had he actually sat on the jury. In short, there is no allegation that the jury which determined petitioner's guilt and sentence were in any way tainted by Mr. Taylor's attitutde.

The Arkansas Supreme Court correctly decided this issue in Singleton v. State, 274 Ark. 126, 623 S.W.2d 180 (1981).

> Appellant exercised a peremptory challenge on each of these prospective jurors but made no showing of record that he would have struck any other juror who actually sat on the trial of the case had he had a peremptory challenge remaining. Under such circumstances we have consistently held that appellant has shown no prejudice since he is unable to show that an objectionable juror was forced upon him without his having the privilege of exercising a peremptory challenge....
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> * * *

> Appellant argues for the first time on appeal that he would have exercised peremptory challenges on two specific jurors had the court granted his challenges for cause. The record does not reflect that the two jurors specified were biased or otherwise unqualified to serve. This Court has consistently held that it will not consider alleged errors raised for the first time on appeal....

Singleton, 274 Ark. at 129-30 (citations omitted).

In other words, the Arkansas Supreme Court found no showing of prejudice with regard to any of the trial court's rulings on prospective jurors because there was no allegation at trial that any of the seated jurors was objectionable. The Arkansas Court requires such a showing at trial or the issue is deemed procedurally waived. This Court is barred from considering petitioner's implication at page 8 of his brief that he would have excused a particular juror who had been a victim of a crime if he had a peremptory remaining, as this was not preserved at trial and was found procedurally barred by the Arkansas Supreme Court. Wainwright v. Sykes, 433 U.S. 72 (1977).

CONCLUSION

This Court should deny the petition for writ of certiorari because this issue was decided properly by the Arkansas Supreme Court, which applied federal constitutional provisions.

Respectfully submitted,

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